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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 PAUL ANCICH,

10 Plaintiff,

11 v.

12 Tug ISLAND BREEZE, Official No. 299737,  
13 her appurtenances, engines, machinery,  
14 equipment, tackle, gear, etc. *in rem*, and  
ISLAND TUG AND BARGE, CO., *in*  
*personam*,

15 Defendants.

No. C08-464RSL

ORDER DENYING FIRST MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT

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17 **I. INTRODUCTION**

18 This matter comes before the Court on plaintiff's "First Motion for Partial Summary  
19 Judgment Re Liability Based on Pre-Capsize Negligence," Dkt. #25. Plaintiff contends that "[i]f  
20 defendant can't establish that the cause was other than negligence, summary judgment on the  
21 issue of causation, and therefore liability, must be entered against defendant." Id. at 17. For the  
22 reasons set forth below, the Court denies plaintiff's motion.  
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25 ORDER DENYING FIRST MOTION  
26 FOR PARTIAL SUMMARY  
JUDGMENT - 1

## II. DISCUSSION

### A. Background

On April 9, 2007, defendant's barge ITB-260, loaded with gravel, capsized while being towed by defendant's tug Island Breeze. As a result, a massive amount of gravel was left on the bottom of Puget Sound along with a steel gate from the barge. On or about October 22, 2007, plaintiff was commercial fishing for salmon using a seine net. The net caught on an underwater obstruction at the same location where defendant's cargo and equipment were dumped. According to plaintiff, he lost his fishing net and related gear as well as valuable fishing time and opportunity. Plaintiff now seeks partial summary judgment on the issue of defendant's negligence in allowing the barge to capsize.

### B. Analysis

Summary judgment is appropriate only when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The Court must view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. See United States v. Johnson Controls, Inc., 457 F.3d 1009, 1013 (9th Cir. 2006). Although "summary judgment in a negligence action is generally disfavored," Camacho v. Du Sung Corp., 121 F.3d 1315, 1317 (9th Cir. 1997), it is proper "where the facts are undisputed and only one conclusion may reasonably be drawn from them," Flying Diamond Corp. v. Pennaluna & Co., Inc., 586 F.2d 707, 713 (9th Cir. 1978).

Plaintiff has not met his burden in this case. Plaintiff first contends that defendant's barge is presumed to have been unseaworthy because it "took on water in good weather under

1 circumstances that the barge must reasonably anticipate.” Dkt. #25 at 10. However, even if the  
2 Court were to agree with the presumption of unseaworthiness, the only conclusion that would  
3 follow is that defendant bears the burden to prove seaworthiness. Plaintiff does not meet his  
4 burden to show the absence of a genuine issue of material fact by merely invoking a  
5 presumption in his favor.

6 Plaintiff’s analysis of the facts is indeed quite cursory. Plaintiff simply states,  
7 “Defendant found a hole in the hull after the capsized. A hole in the hull of a seagoing barge is,  
8 obviously, unseaworthiness.” Dkt. #25 at 11. However, defendant contends that the vessel was  
9 not unseaworthy at departure and that the hole was caused by the stanchions during travel. See  
10 id. at 6-7; Dkt. #31 at 8; cf. Walker v. Harris, 335 F.2d 185, 193 (5th Cir. 1964) (“[T]he only  
11 escape from the inference of unseaworthiness is proof that some new, unforeseen, intervening  
12 force or factor brought about the failure of the ship or gear.”). Plaintiff has not offered any  
13 evidence from which the Court could determine on summary judgment that the barge was in fact  
14 unseaworthy.

15 Plaintiff next contends that *res ipsa loquitur* applies in this case and defendant bears the  
16 burden to show it was not negligent. “*Res ipsa loquitur* applies when ‘1) the injured party was  
17 without fault; 2) the instrumentality causing the injury was under the exclusive control of the  
18 defendant; and 3) the mishap is of a type that ordinarily does not occur in the absence of  
19 negligence.’” Lone Star Indus., Inc. v. Mays Towing Co., Inc., 927 F.2d 1453, 1457 (8th Cir.  
20 1991) (quoting Consol. Grain & Barge Co. v. Huffman Towing Co., 801 F.2d 1072, 1074 (8th  
21 Cir. 1986) (McMillan, J., dissenting)). Even if the Court were to agree that plaintiff has  
22 established the first two factors,<sup>1</sup> the third factor presents a genuine issue of material fact. The  
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24 <sup>1</sup> Defendant contends that it did not have exclusive control over the gravel itself. Dkt. #31 at 10.

1 third element requires the Court to “determine that ‘there was . . . more basis for attributing the  
2 damage to some kind of incident that likely would not have occurred without negligence on the  
3 defendant’s part, than for attributing it to some kind of incident likely not involving negligence.’”  
4 Id. (quoting Agri-Trans Corp. v. Peavey Co., 742 F.2d 1137, 1139 (8th Cir. 1984)). Defendant  
5 disputes that the incident is of the type that ordinarily does not occur in the absence of  
6 negligence. It contends that cargo “does occasionally shift to achieve its normal angle of  
7 repose” but that the shift that occurred on April 9, 2007 was “unforeseen and unprecedented.”  
8 Dkt. #31 at 10. Based on the minimal evidence presented by the parties, the Court has no basis  
9 to determine whether the capsizes would not have occurred from normal or safe operation of the  
10 vessel. Cf. Lone Star Indus., 927 F.2d at 1458 (court points to expert testimony regarding  
11 whether fracture would result from normal wear and tear). Plaintiff has provided little more  
12 than his own word that the capsizes resulted from defendant’s negligence, and has therefore  
13 failed to meet his burden on summary judgment.

14 Finally, plaintiff lists four reasons why “defendant is negligent as a matter of law,” Dkt.  
15 #25 at 12. But plaintiff’s speculations about which of defendant’s actions caused the capsizes do  
16 not merit a summary judgment determination. While plaintiff contends that absence of a  
17 working pump is sufficient to establish negligence, Dkt. #25 at 13, defendant maintains that  
18 industry practice does not necessitate a pump on unmanned barges, Dkt. #34 ¶ 10. While  
19 plaintiff contends that the captain demonstrated negligence in navigating through an area of  
20 known rip tides with “slippery” cargo, Dkt. #25 at 13, the captain’s report does not indicate  
21 whether rip tides caused the gravel shift, Dkt. #26, Ex. 1 at 2. While plaintiff asserts that the  
22 captain was too slow to notice that the barge was listing and to call for assistance, Dkt. #25 at  
23 15, defendant maintains that the captain duly responded to an unforeseeable situation, Dkt. #31  
24 at 9. Finally, while plaintiff suggests that the captain failed to beach the barge at the nearest

1 point, Dkt. #25 at 16, defendant asserts that the captain steered toward the nearest available  
2 beach, Dkt. #31 at 9. In short, the case is so riddled with factual disputes as to render it  
3 ineligible for summary judgment. Moreover, plaintiff has provided no expert testimony to assist  
4 the Court in weighing the assertions on either side, leaving the Court unable to determine which  
5 issues of fact are material and which positions are viable.

6 In sum, plaintiff's motion seeking a liability determination is premature. Plaintiff  
7 confuses burden shifting and legal presumptions with an entitlement to judgment as a matter of  
8 law. In emphasizing defendant's burden of proof at trial, plaintiff has neglected his own burden  
9 on summary judgment to prove the absence of a genuine issue of material fact.

### 10 **III. CONCLUSION**

11 For all of the foregoing reasons, plaintiff's motion for partial summary judgment (Dkt.  
12 #25) is DENIED.

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14 DATED this 8<sup>th</sup> day of June, 2009.

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20 Robert S. Lasnik  
21 United States District Judge  
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